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No. 73-927

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In the Supreme Court of the United States

OCTOBER TERM, 1973

BENJAMIN F. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in refusing to permit the jury, after it retired to deliberate, to hear recordings of telephone conversations which had been admitted into evidence, but not played before the jury.

Petitioner was charged in Count IV of a four count indictment, together with co-defendants William Thomas and Sherri Harris, with conspiring to distribute heroin, in violation of 21 U.S.C. 846. Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted and sentenced to fifteen years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner was involved in sales of heroin to government informer on March 21, 28 and 29, 1972. On each date, prior to the

sale, the informer placed a telephone call from the Indianapolis Office of the Bureau of Narcotics and Dangerous Drugs to Mr. Benjamin's Tailoring Shop and spoke to petitioner, who was the proprietor of the shop. These calls were to make arrangements for the subsequent sales. Each call was monitored and recorded by a BNDD agent with the informer's consent (Pet. App. 2a; Tr. 5-7, 29-30, 43-45). Following the first telephone call, the informer went to petitioner's shop, where he purchased a quantity of heroin from co-defendant Thomas (Pet. App. 2a). Following the second and third telephone calls, the informer went to petitioner's shop and was directed by petitioner to the apartment of co-defendant Harris, where the sale was consummated (Pet. App. 2a-3a).

At trial, the tape recordings of the conversations between petitioner and the government informer were admitted into evidence, together with transcripts of the conversations, which had been transcribed by the agent who had overheard the conversations (Tr. 79-84).[1] When the government offered the transcripts into evidence, petitioner's counsel examined the agent who transcribed the tapes to determine their accuracy; the transcripts were then admitted without objection (Pet. App. 4a-5a; Tr. 81-83). Shortly thereafter, the

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[1]Although petitioner does not challenge the sufficiency of the evidence to sustain his conviction, we point out that in addition to the transcripts of the tape recorded conversations, the substance of those conversations was testified to by the informer. The government informer testified about the conversations with petitioner on March 28 and 29 in which the purchase of heroin was discussed. He also testified that petitioner directed him to the place where he could make the purchases. (Tr. 216-223, 235-236). This was corroborated by agents who overheard parts of the conversations through the use of a Kel transmitting device hidden on the informer's person (Tr. 84-100).

tape recordings themselves were admitted without objection (Tr. 83-84). The entire text of the transcripts was read to the jury (Tr. 206-214) and given to the jurors to read for themselves (Tr. 382). The tape recordings were not played before the jury. The court stated that during the deliberations the jury would not be given a tape recorder with which to listen to the tapes, but would be given the transcripts of the recordings (Pet. App. 5a; Tr. 382, 388)[2]. Petitioner testified on his own behalf and admitted having telephone conversations with the informer, but denied that they concerned narcotics (Tr. 422-423).

Petitioner argues that he was prejudiced by the fact that the tapes were not played to the jury and were not available to the jury during their deliberations. He alleges that several objections were made concerning the testimony of the government informer and requests made that the tapes be played (Pet. 5). The record reveals, however, that petitioner's objections were directed to preventing the informer from testifying to conversations with petitioner because transcripts and recordings of those conversations had already been admitted into evidence and should be presented to the jury. The transcripts of the recordings were then read to the jury as a result of petitioner's objections (Tr. 206-214). No objection was made when the government offered to read the transcripts rather than play the tapes (Tr. 206). The accuracy of the transcripts was never challenged and was in fact stipulated to by all parties (Tr. 81, 83). Petitioner has failed to show that he was in any

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[2]The court did not give a reason for not allowing a recorder in the jury room, and petitioner did not object to the ruling (Pet. App. 3a; Tr. 388).

way prejudiced by the fact that the tapes themselves were not made available to the jury.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]Petitioner's claim that if the tapes had been played the jury could have compared petitioner's voice with the recorded voice goes merely to the sufficiency of the voice identification. The evidence on that issue was ample. Moreover, petitioner did not ask to play the recording for that purpose, and there is no indication in the record that he would have been prevented from doing so.